IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 2756 OF 2004
WITH
WRIT PETITION No. 2813 OF 2005

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WRIT PETITION No. 2756 OF 2004

1. The Union of India)
through the Chief Engineer)
(Navy) Mumbai, 26 Assay)
Building, Colaba Mumbai.)
)
2. The Commander Works Engineer)
(Naval Works), Dr. Homi)
Bhabha Marg, Navy Nagar,)
Colaba, Mumbai. .. Petitioners

Vs.

1. Pandurang Mahadev Amate)
)
2. Raju N. Ranavare)
)
3. Manbahdur Thappa .... Respondents

Mr. R. Shetty with Mr. R.C. Master i/b. T. C. Kaushik, Advocate for the Petitioner.

Mr. S. S. Karkare with Mr. S. G. Pillai, Advocate for Respondent Nos. 1 to 3.

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WRIT PETITION No. 2813 OF 2005

1. The Union of India,through)
The Chief Engineer (Navy))
26 Assaye Buildings, Colaba)
Mumbai - 05.)
)
2. Commander Works Engineer)
(Naval Works), Dr. Homi)
Bhabha Road, Navy Nagar,)
Colaba, Mumbai - 05.)Petitioners

Vs.

Shri Kaushik Mohan Sawant)
467/5 MES Colony, Chunnabhaty)
Post-NAD-Karanja, Taluka-Uran)
District-Raigad)..Respondent

Mr. R. R. Shetty with Mr. N. D. Sharma, i/b
Dr. T. C. Kaushik, for the Petitioners.

Mr. S. S. Karkare with Mr. S. G. Pillai,
Advocates for the Respondent.

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CORAM : F.I. REBELLO,
AND
ANOOP V. MOHTA, JJ.

DATE : AUGUST 30, 2006.

ORAL JUDGMENT

. Rule in both the Petitioners. Heard forthwith. As the issue involved in these petitioners are common, they are being disposed off by a common order.

2. The Petitioners herein had invited applications for the post of Mazdoor which included (General 007 (including 02 ex-servicemen), 04 OBCs (including 1 Ex-serviceman), 2 SC, and 1 ST and 12 Chowkidars. The recruitment notice was issued on 29-8-2000. The Respondents herein after following the prescribed selection process, completed the same on 18-12-2000. Before the offer of appointment could be issued, the

Petitioners were informed by the Ministry of Defence that there was a ban on selection, imposed by the Department of Personnel on 5-8-1999. As such, no actual orders of appointments were issued to the Respondents. After the ban was lifted, another recruitment notice was issued on 11-7-2003, inviting application for post of 10 Mazdoors. Aggrieved by this notice, the Respondents filed Original Application before the Central Administrative Tribunal. The Respondents in Writ Petition No. 2756 of 2004 had filed O.A. No. 663 of 2003 and Respondent in Writ Petition filed No. 2813 of 2005 had filed on OA No.457 of 2004. It was the case of the Respondents before the learned Tribunal that once the selection was made and the panel prepared, persons whose names were on the panel had to be first given appointment and only after the list of names on the panel was exhausted, was it open to the Petitioners to invite applications for fresh recruitment. Respondents relied on the DOPT Office Memo 82/1982. It was urged on behalf of the Petitioners that there was a ban in force and as such the entire action of recruitment was without authority and therefore, ab-initio

void. It was also pointed out that even if some action had been taken, considering that the selection process itself was void, the Respondents could claim no legal right.

3. The learned Tribunal found that the selection process was undertaken as a result of recruitment notice issued on 28th August, 2000. The advertisement was issued by the competent authority and the selection process has been by done by a duly constituted Selection Committee, authorised by the Appointing Authority. The appointments could not be made, only because it was later discovered that at the time when the recruitment was undertaken, there was a ban on recruitment, imposed by the Department of Personnel (DOPT). The Tribunal then posed to itself the main question, as to whether the selection which was done in the year 2000 would be alive at the time of recruitment notice dated 11-7-2003, by which fresh recruitment process was commenced. The learned Tribunal then quoted from Office Memo (OM) dated 8-2-1982. It also noted the instructions relating to the candidates who had been selected. The Tribunal, also considered the

argument advanced on behalf of the Respondents, that once an appointment order had been issued to one Mr. Senapati, others similarly selected had to be issued letter of appointment. This was however, contested by the Respondents. The learned Tribunal, however, recorded a finding that Regular Selection process had been undertaken and the candidates were selected and it was not the fault of the Respondents, that the recruitment process was undertaken without knowing the DOPT's ban, and that some of the selected candidates who were eligible, if they apply afresh for the post, because of the age, they would not be considered. The Tribunal under these circumstances thought, that in all fairness that selection made as a result of recruitment notice issued on 29-8-2003, be not scrapped and be made operative for future vacancy, arising in the said department. In O.A. No. 457 of 2004, which was disposed on 6th June, 2005 certain judgments have also been relied upon. The directions given in O.A. No. 457 of 2004 was that if the applicant finds place in the list of selected candidates, the applicant be appointed in existing future vacancy and should be given seniority on the

basis of actual date of appointment. The Tribunal also noted that O.A. No. 663 of 2003 had been allowed on 5-11-2003.

4. Learned counsels have urged the same contention as was urged before the Tribunal, before this Court. It has also been urged on behalf of the Petitioners that Office Memo of DOPT dated 8-2-1982 would only apply in a case when a select list had been prepared legally. It is further reiterated that the Office Memo requires, that a person has to be declared successful, according to merit list of selected candidates. The Tribunal itself had noted that the office memo applies to candidates who have been selected. In the instant case, though the selection procedure had been set in motion and candidates were short listed, the select list was never displayed, nor was acted upon. The purported letter containing offer of appointment was never issued to any person, including Mr. Senapati and it appears that it was taken from the file. At any rate it was not open to the learned Tribunal to have held that there was a select list and to issue directions as had been issued. By an

additional affidavit of Dharma Sheel, SE, Commander Works Engineer (Naval Works) Mumbai, it is pointed out, that the Respondents in Writ Petition No. 2756 of 2004, pursuant to the recruitment notice dated 11th July, 2003 had submitted applications for being considered for selection and it is only after having applied, had the Respondent Filed Original Application on 18th September, 2003. It is also pointed out that the entire recruitment of 2000 was scraped not only in Mumbai but all over India.

5. On the other hand, on behalf of Respondent it is submitted that the learned Tribunal has correctly held the Office Memo of DOPT would apply and merely because of the ban would not result in the selection process being declared a nullity at law. At the highest, the recruitment process could not be completed and once the ban was lifted, the Petitioners were duty bound to follow the Office Memo and first appoint those persons, whose names were found in the select list pursuant to the recruitment process of 2000. Reliance is also placed on the judgment of this Court in the case of **Vasant A. Mandelkar & 7 Ors. Vs. The General**

Manager, & 3 Ors. in Writ Petition No. 94 of 2006, decided on 27th March, 2006 to point out that this Court has accepted that Office Memo dated 7th May 1998 would result in those who were selected had a right to have their names maintained on the selection list and be offered appointment against existing and future vacancies and only after the select list is exhausted to start the fresh recruitment process.

6. We have a noted from the order passed in W.P. No.941 of 2006 that the only direction given was to permit the Petitioners, there to apply for the vacancies advertised in January 2006, with a direction to the Respondents, not to reject the Applications of the Petitioners there in the event of age bar. In our opinion, that judgment on the facts of the present case would be of no assistance to the Respondents.

7. Having said so, the question is whether this Court should interfere with the orders of Central Administrative Tribunal in the exercise of its extra-ordinary jurisdiction. We may refer to the relevant portion of the Office

Memo of DOPT dated 8-2-1982 which reads as under-

"3. The matter has been carefully considered. Normally recruitment whether from the open market or through a Departmental Competitive Examination should take place only when there are no candidates available from an earlier list of selected candidates. however, there is a likelihood of vacancies arising in future, in case names of selected candidates are already available, there should either be no further recruitment till the available selected candidates are absorbed or the declared vacancies for the next examination should take into account the number of persons awaiting appointment. Thus, there would be no limit on the period validity of the list of selected candidates proposed to the extent of declared vacancies, either by the method of direct recruitment or through a Departmental Competitive Examination.

> 4. Once a person is declared successful according to merit list of selected candidates, which is based on the declared number of vacancies, the appointing authority has the responsibility to appoint him even if the number of vacancies undergoes a change after his name has been included in the list of selected candidates. Thus where selected candidates are awaiting appointment, recruitment should either be postponed till all the selected candidates are accommodated or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointments first, before starting appointments from a fresh list from a subsequent recruitment or examination."

A careful perusal of the said Office Memo would indicate that it is in respect of the select list. Normally, a select list would include an

equal number of candidates for the posts which was advertised and also a list of persons as wait listed candidates. Candidates who are wait listed can be considered, if for some reason the candidates in the select list either do not accept the offer of appointment or of some other reason are declared ineligible. Once all the vacancies are filled in, the select list exhausts itself and the wait listed candidates have no longer a right for consideration. This in service jurisprudence would be the rule. This aspect has been set out to understand correctly the concept of select list. The office memo itself speaks about the period of validity of list to the extent of declared vacancies. In other words, the select list cannot exceed the declared number of vacancies. Having said so, we may now address ourselves to the issue as to whether there was a select list in existence, based on which the Respondents can claim a right for consideration, considering the Office Memo dated 8-2-1982. We have earlier noted that there was a complete ban imposed on recruitment from 5-8-1999. In other words, it was not open to any department of the Union of

India, to have resorted to the process of recruitment. In the instant case, the recruitment notice was issued on 28-9-2000, during the period of ban. There is no challenge to the legality of the constitution of the Committee, or the procedure for selection considered of the selection committee. The question is whether in the absence of publication of the select list, merely because a Selection Committee may have interviewed the candidates and prepared a list, can it be said that there was a select list in existence. In the instant case, admittedly none from those who were purportedly selected have been officially issued any offer of appointment. This was because, the attention of the relevant department was invited to the letter dated 5-8-1989 imposing a ban on recruitment. The selection process had been completed on 18-2-2000. In our opinion, apart from the fact that there was a duly constituted Selection Committee, the Selection Committee must have been constituted to fill in posts which were available to be filled in. If a Selection Committee was constituted, in ignorance of the ban of recruitment, merely

because due procedure was followed, cannot result in the selection done by the Committee, becoming legal. Even in a case of selection validly done, it is open to the appointing authority to cancel the select list for valid reasons. It has been pointed to us that it is not merely a case of cancellation of selection to the the 10 posts which were the subject matter of the two Original Applications. In the additional affidavit of Dharma Sheel, SE, Commander Works Engineer (Naval Works), Mumbai, it has been set out "**there are altogether 801 posts all over India, recruitment in respect of which had been stopped."** None of the candidates, who were selected, were issued any offer of appointment. It could have been understood if offers of appointment had been issued to some, pursuant to which perhaps, the argument of the select list being in existence could have been considered. In the instant case, even before the select list could be acted upon, it was scrapped or treated as void. A select list therefore, being in existence, would not arise. We are clearly of the opinion that learned Tribunal misdirected itself in law in issuing directions in the two Original

Applications which were before it and which orders are now the subject matter of the present Petition.

8. The submission on behalf of the Petitioners that Respondents are stopped from challenging the selection process of 2003, in our opinion, would not be legally correct. The Respondents had been representing to the Petitioners. The original application made by them cannot be held against them. They had immediately applied to the Tribunal by filing Original Application and sought stay. No stay was granted to the recruitment process. In these circumstances, it cannot be said that the Respondents are estopped from contending that the selection process of 2003 was without the authority of law. At any rate, if the Respondents have a legal right, it is no answer to contend that they are barred by the principle of estoppel. Estoppel would apply to facts and not to law. That contention is therefore, rejected.

9. Considering the above, in our view both the Petitions have to be allowed and in the

light of that, Rule made absolute in terms of prayer Clause (a) in both petitions. However, if new vacancies are notified, the Respondents be permitted to apply for such vacancies as a one time measure and if they so apply, their applications be considered, without taking into consideration that the Respondents are age barred.

10. Rule made absolute accordingly. There shall be no orders as to costs.

[ANOOP V. MOHTA, J.] **[F.I. RUBELLO, J.]**